

**Oregon State Bar
Special Meeting of the Board of Governors**

January 8, 2016

8:45 a.m.

Oregon State Bar Center

Tigard, Oregon

Open Agenda

- | | | | |
|----|---|--------|---------|
| 1. | Call to Order | | |
| 2. | Swearing In of New BOG Members [Mr. Heysell] | Action | |
| 3. | Consider ABA Model Regulatory Objectives Resolution | Action | Exhibit |
| 4. | Consider BBX Recommendation Regarding UBE | Action | Exhibit |

AMERICAN BAR ASSOCIATION
COMMISSION ON THE FUTURE OF LEGAL SERVICES
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
CRIMINAL JUSTICE SECTION
LAW PRACTICE DIVISION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
STANDING COMMITTEE ON CLIENT PROTECTION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the ABA Model Regulatory Objectives
 2 for the Provision of Legal Services, dated February, 2016.

3
 4 ABA Model Regulatory Objectives for the Provision of Legal Services

- 5
 6 A. Protection of the public
 7 B. Advancement of the administration of justice and the rule of law
 8 C. Meaningful access to justice and information about the law, legal issues, and the civil and
 9 criminal justice systems
 10 D. Transparency regarding the nature and scope of legal services to be provided, the
 11 credentials of those who provide them, and the availability of regulatory protections
 12 E. Delivery of affordable and accessible legal services
 13 F. Efficient, competent, and ethical delivery of legal services
 14 G. Protection of privileged and confidential information
 15 H. Independence of professional judgment
 16 I. Accessible civil remedies for negligence and breach of other duties owed, and
 17 disciplinary sanctions for misconduct
 18 J. Diversity and inclusion among legal services providers and freedom from discrimination
 19 for those receiving legal services and in the justice system
 20
 21

22 FURTHER RESOLVED, That the American Bar Association urges that each state’s highest
 23 court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives

24 for the Provision of Legal Services when they assess the court’s existing regulatory framework
25 and any other regulations they may choose to develop concerning non-traditional legal service
26 providers.

REPORT

I. Background on the Development of ABA Model Regulatory Objectives for the Provision of Legal Services

The American Bar Association’s [Commission on the Future of Legal Services](#) was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services.¹ As one part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. The Commission found that U.S. jurisdictions are considering the adoption of regulatory objectives to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape. Moreover, numerous countries already have adopted their own regulatory objectives.

The Commission concluded that the development of regulatory objectives is a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

This Report discusses why the Commission urges the House of Delegates to adopt the accompanying Resolution.

II. The Purpose of Model Regulatory Objectives for the Provision of Legal Services

The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One recent article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide

¹ Additional information about the Commission, including descriptions of the Commission’s six working groups, can be found on the Commission’s [website](#) as well as in the Commission’s November 3, 2014 issues [paper](#). That paper generated more than [60 comments](#).

to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.²

In addition to these benefits, the Commission believes Model Regulatory Objectives for the Provision of Legal Services will be useful to guide the regulation of an increasingly wide array of already existing and possible future legal services providers.³ The legal landscape is changing at an unprecedented rate. In 2012, investors put \$66 million dollars into legal service technology companies. By 2013, that figure was \$458 million.⁴ One source indicates that there are well over a thousand legal tech startup companies currently in existence.⁵ Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.

A number of U.S. jurisdictions have articulated specific regulatory objectives for the lawyer disciplinary function.⁶ At least one U.S. jurisdiction (Colorado) is considering the adoption of regulatory objectives that are intended to have broader application similar to the proposed ABA

² Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM LAW REVIEW 2685, 2686 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003. The original quote refers to “legislation” rather than “regulation,” but regulatory objectives serve the same purpose in both cases.

³ As noted by the ABA Standing Committee on Paralegals in its comments to the Commission, paralegals already assist in the accomplishment of many of the Commission’s proposed Regulatory Objectives.

⁴ Joshua Kubick, *2013 was a Big Year for Legal Startups; 2014 Could Be Bigger*, TechCo (Feb. 14, 2015), available at <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>.

⁵ <https://angel.co/legal>

⁶ For example, in Arizona “the stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct.” *In re Murray*, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). In addition, the Court views “discipline as assisting, if possible, in the rehabilitation of an errant lawyer.” *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987). California Business & Professions Code Section 6001.1 states that “[T]he protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” The Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) adopted the following: “The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”

Model Regulatory Objectives for the Provision of Legal Services.⁷ In addition, the development and adoption of regulatory objectives with broad application has become increasingly common around the world. Nearly two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending. Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples.⁸

These Model Regulatory Objectives for the Provision of Legal Services are intended to stand on their own. Regulators should be able to identify the goals they seek to achieve through existing and new regulations. Having explicit regulatory objectives ensures credibility and transparency, thus enhancing public trust as well as the confidence of those who are regulated.⁹

From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures). The adoption of this Resolution, however, does not predetermine or even imply a position on those issues by the ABA. If and when any other issues come to the floor of the House of Delegates, the Association can and should have a full and informed debate about them.

The Commission intends for these Model Regulatory Objectives for the Provision of Legal Services to be used by supreme courts and their regulatory agencies. As noted in the Further Resolved Clause of this Resolution, the Objectives are offered as a guide to supreme courts. They can serve as such for new regulations and the interpretation of existing regulations,¹⁰ even in the absence of formal adoption. As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.

Although regulatory objectives have been adopted by legislatures of other countries due to the manner in which their governments operate, they are equally useful in the context of the judicially-based system of legal services regulation in the U.S., which has been long supported by the ABA.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way,

⁷ A Supreme Court of Colorado Advisory Committee is currently developing, for adoption by the Court, “Regulatory Objectives of the Supreme Court of Colorado.”

⁸ For a more extensive history of the “regulatory objectives movement,” see Laurel Terry, *Why Your Jurisdiction Should Jump on the Regulatory Objectives Bandwagon*, THE PROFESSIONAL LAWYER (2013), available at http://www.personal.psu.edu/faculty/l/s/lst3/Terry_Regulatory_Objectives_Bandwagon_2013.pdf.

⁹ As Professor Laurel Terry states in comments she submitted in response to the Commission’s circulation of a draft of these Regulatory Objectives, if “a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone’s interest.”

¹⁰ Existing court rules providing for alternatives to discipline programs exemplify how the Objective of ensuring the efficient, competent and ethical delivery of legal services should be read to encompass the need to confront legal services provider impairments in the most effective manner for the good of the legal system. See, e.g., Rule 11(G) of the ABA Model Rules for Lawyer Disciplinary Enforcement.

regulatory objectives are intended to offer guidance to U.S. jurisdictions with regard to the foundation of existing legal services regulations (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

III. Relationship to the Legal Profession’s Core Values

Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the “legal profession.”¹¹ By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.¹²

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

IV. Recommended ABA Model Regulatory Objectives for the Provision of Legal Services

The Commission developed the Model Regulatory Objectives for the Provision of Legal Services by drawing on the expertise of its own members,¹³ discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen

¹¹ See ABA House of Delegates Recommendation 10F (adopted July 11, 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html. This recommendation lists the following as among the core values of the legal profession: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer’s duty to promote access to justice.

¹² The Commission notes that there also are important professionalism values to which all legal services providers should aspire. Some aspects of professionalism fold into the Objectives related to ethical delivery of services, independence of professional judgment and access to justice. Others may not fit neatly into the distinct purpose of regulatory objectives for legal services providers, just as they do not fall within the mandate of the ethics rules for lawyers,

¹³ The Commission includes representatives from the judiciary and regulatory bodies, academics, and practitioners.

jurisdictions, and reading the work of several scholars and resource experts.¹⁴ The Commission also sought input and incorporated suggestions from individuals and other entities, including the ABA Standing Committee on Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

Respectfully submitted,

Judy Perry Martinez, Chair
Andrew Perlman, Vice-Chair
Commission on the Future of Legal Services

February 2016

¹⁴ Materials reviewed include Steve Mark, Tahlia Gordon, Marlene LeBrun & Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, available at http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/preserving%20ethics%20integrity%20legal%20profession%20uk_paper.pdf; Andrew Perlman, *Towards the Law of Legal Services* (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561014; Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM LAW REVIEW* 2685, 2686 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003; THE LAW SOCIETY, THE MINISTRY OF JUSTICE'S CALL FOR EVIDENCE ON THE REGULATION OF LEGAL SERVICES IN ENGLAND AND WALES: THE LAW SOCIETY'S RESPONSE (Sept. 2, 2013), available at <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/regulation-of-legal-services/>.

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on the Future of Legal Services

Submitted By: Judy Perry Martinez, Chair

1. Summary of Resolution(s).

The Commission on the Future of Legal Services seeks adoption of ABA Model Regulatory Objectives for the Provision of Legal Services by the House of Delegates. The Commission further requests that the House recommend that each state's highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

It is important for regulators to be able to easily identify the goals they seek to achieve through existing and new regulations. The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services in order that the courts can assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services also will help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

2. Approval by Submitting Entity.

The Commission on the Future of Legal Services approved the filing of this Resolution at its meeting on September 25 and 26, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This Resolution is consistent with existing and longstanding ABA policies supporting state-based judicial regulation and does not affect them.

5. If this is a late report, what urgency exists which requires action at this meeting of the

House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies relating to the regulation of the legal profession that are adopted by the House of Delegates. The Policy Implementation Committee works with the Conference of Chief Justices as part of its process. The Commission on the Future of Legal Services has been in communication with Center for Professional Responsibility volunteer leadership and the Center Director in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Commission on Ethics 20/20, Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct. The Commission will also engage the ABA Legal Services Division regarding the implementation effort should the House adopt the Resolution.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

10. Referrals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. In addition, the Commission consulted with the ABA Standing Committee on Professional Discipline and Standing Committee on Ethics and Professional Responsibility at an earlier stage during its study of regulatory objectives. The Commission carefully considered the feedback from those entities in the development of this Resolution.

Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Ellyn S. Rosen
Deputy Director and Regulation Counsel
ABA Center for Professional Responsibility
321 North Clark Street, 17th floor
Chicago, IL 60654-7598
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11. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Judy Perry Martinez
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Commission on the Future of Legal Services is proposing for House of Delegates adoption ABA Model Regulatory Objectives for the Provision of Legal Services. The Commission also requests that the House adopt the part of the Resolution that recommends that each state's highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, and that enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

2. Summary of the Issue that the Resolution Addresses

The ABA [Commission on the Future of Legal Services](#) was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public's access to, those services. As one part of its multifaceted work, the Commission engaged in extensive research about regulatory developments in the U.S. and abroad. The ABA has long supported state-based judicial regulation; its policies doing so do not, however, set forth a centralized framework of broad and explicit regulatory objectives to serve as a guide for such regulation. This Resolution, if adopted, would fill this policy void and serve as a useful tool to help courts easily identify the explicit goals they seek to achieve when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of broad regulatory objectives, and given that providers of legal assistance other than lawyers are already actively serving the American public, the Commission believes that it is timely and important for the ABA to offer guidance in this area.

3. Please Explain How the Proposed Policy Position will address the issue

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create the valuable and needed framework to help courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services: (1) assess their existing regulatory framework and (2) identify and implement regulations related to legal services beyond the traditional regulation of the legal profession. While allowing for jurisdictional flexibility, the centralized framework set forth in the ABA Model Regulatory Objectives for the Provision of Legal Services would also facilitate jurisdictional consistency.

Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

4. Summary of Minority Views

From the outset, the Commission on the Future of Legal Services has been committed to and implemented a process that is transparent and open. The Commission has engaged in broad outreach and provided full opportunity for input into its work. Inherent in any undertaking of this scope and complexity is the recognition that there will be disagreements about the approach to issues as well as the substance of proposals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. At the time this Executive Summary was filed with the House of Delegates, the Commission was aware only that the following disagree with the Resolution:

The New Jersey State Bar Association has expressed its belief that the Resolution is contrary to the profession's core values and promotes a tiered system of justice.

Larry Fox filed comment in opposition in his individual capacity.



NEW JERSEY STATE BAR ASSOCIATION

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October 27, 2015

Judy Perry Martinez
Chair, ABA Commission on the Future of Legal Services

Dear Chair Martinez:

On behalf of the New Jersey State Bar Association (“NJSBA”), please accept these comments in response to the Commission on Legal Services’ resolution proposing Model Regulatory Objectives (“Resolution”). The NJSBA appreciates the Commission’s efforts to address the seemingly intractable problem of access to legal services. However, after reviewing the Resolution, the NJSBA Board of Trustees voted unanimously to submit written opposition to the Resolution because it is contrary to our profession’s core values, and promotes a tiered system of justice that will imperil those most vulnerable in our society.

The Resolution assumes that non-lawyers should be permitted to provide legal services, and its report details its intent is “*to guide the creation . . . of a wider array of legal services regulations, such as regulations covering new categories of legal services providers.*” The Resolution also implicitly endorses alternative business structures (“ABS”), where non-lawyers can own law firms.¹ Prior to proposing a regulatory framework for these activities, the Commission should first address the underlying questions of *whether* non-lawyers should be permitted to

¹ In discussing the need and for the Model Regulatory Objectives, the Report refers to the many jurisdictions that have adopted regulatory objectives, including Australia, England, Ireland, Scotland, Wales, and New Zealand. The Report, however, omits that the objectives were only adopted as a result of these jurisdictions revising their standards to permit ABS.

provide legal services, and *whether* non-lawyers should be permitted to own law firms and/or share in their profits.

We believe the answer to both questions is an unequivocal “No.”

The American Bar Association (“ABA”) has long been a leader in the area of unmet legal needs, and New Jersey has proudly supported those efforts. In 2006, the ABA House of Delegates unanimously adopted Resolution 112A, a civil *Gideon* Resolution drafted by the ABA Task Force on Access to Civil Justice. 112A called upon the federal government, states and territories to provide *counsel as a matter of right* in adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

In 2013, ABA President Silkenat’s Legal Access Job Core called upon states to meet unmet legal needs by connecting those in need of legal services with the vast number of under-employed and unemployed attorneys.

In response, my predecessor NJSBA President Paris P. Eliades launched the New Jersey Blue Ribbon Commission on Unmet Legal Needs to study how to leverage these potential synergies, and that Commission continues to study innovative methods to bridge the access divide.

The Future Commission’s Resolution is in direct conflict with these prior initiatives and contrary to the core principle of our legal system that lawyers are singularly and uniquely qualified to provide legal counsel. The Commission should not support, let alone encourage, the creation of a second tier of legal providers, whose creation will result in an unequal system of justice. Rather, the Commission should focus on solutions that live up to our justice system’s promise of providing “*equal justice under the law.*”

The proponents also argue the Resolution is necessary because non-lawyers have expended billions of dollars to penetrate the legal services market. Proponents point to the vast array of non-lawyer service providers operating on the Internet and argue that their continued existence is inevitable. However, the fact that non-lawyers have invested significantly into the legal profession is not a

basis to allow them to continue. It certainly is not a basis for the ABA to endorse their continued existence. The fact that companies develop on the Internet does not insulate them from complying with state and federal laws. The ABA is uniquely situated to protect the public and the justice system from unethical and illegal infringement by non-lawyers into the justice system. The ABA should avail itself of its unique role, as opposed to abrogating it to the argument of inevitability.

Finally, the Commission should withdraw the Resolution until such time as the House of Delegates has reviewed and approved the Commission's substantive recommendations. If the Commission believes that non-legal providers serve the public interest, or that ABS can function without compromising attorney independence and confidentiality requirements, it should propose and pass resolutions in support of those concepts. Until such time as the House of Delegates agrees and approves of such substantive resolutions, there is simply no basis to pass a framework for the regulation of "new" practices that are contrary to existing and long-standing ABA policy.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Miles S. Winder III", with a horizontal line underneath.

Miles S. Winder III

President

New Jersey State Bar Association



RESOLUTION

WHEREAS, the American Bar Association (ABA) Commission on the Future of Legal Services has submitted a report and resolution to the ABA House of Delegates for consideration at its 2016 Mid-Year Meeting; and

WHEREAS, the Resolution urges the ABA to adopt prescribed Model Regulatory Objectives and to urge each state's highest court to be guided by the objectives that would have each court assess its existing regulatory framework, and further identify and implement regulations related to legal services beyond the traditional regulation of the legal profession; and

WHEREAS, the New Jersey State Bar Association (NJSBA) has submitted comments opposing the Model Regulatory Objectives, calling upon the Commission to withdraw the Resolution until the House of Delegates passes resolutions supporting the concepts; and

WHEREAS, the NJSBA believes these proposed objectives are contrary to our profession's core values, and promote a tiered system of justice that will imperil those most vulnerable in our society; and

WHEREAS, the Resolution assumes that non-lawyers should be permitted to provide legal services; and

WHEREAS, the Resolution also implicitly endorses alternative business structures, where non-lawyers can own law firms; and

WHEREAS, the NJSBA believes both concepts are contrary to the core principle of our legal system that lawyers are singularly and uniquely qualified to provide legal counsel; and

WHEREAS, The ABA has long been a leader in the area of unmet legal needs, and has called upon states to meet unmet legal needs by connecting those in need of legal services with the vast number of under-employed and unemployed attorneys; and

WHEREAS, The NJSBA has proudly supported those efforts as part of its mission, and has additionally launched the New Jersey Blue Ribbon Commission on Unmet Legal Needs to study innovative methods to bridge the access divide.

NOW THEREFORE, BE IT RESOLVED that the NJSBA directs its ABA Delegates to vote against the Resolution submitted by the ABA Commission on the Future of Legal Services in connection with Model Regulatory Objectives at the 2016 Mid-Year Meeting.

I, Kimberly A. Yonta, Secretary of the New Jersey State Bar Association, do hereby certify that the above is a full, true and correct copy of a resolution unanimously passed by the Board of Trustees at a regularly scheduled meeting on Dec. 11, 2015.

In witness whereof, I have hereto set my hand as such Secretary and affix the corporate seal of the New Jersey State Bar Association on this 16th day of December, 2015.



Kimberly A. Yonta
Secretary

Oregon State Bar Bulletin — JULY 2015

July Issue



President's Message

A Joint Message to the Bar:

Oregon Considers the Unified Bar Exam

By Rich Spier & David F. White

Note from OSB President Rich Spier: I have asked David White, chair of the Oregon Board of Bar Examiners, to be my co-author this month on the important subject of the Uniform Bar Examination.

Representatives from the Oregon Supreme Court, the Oregon State Bar Board of Governors, the Board of Bar Examiners and each of the three Oregon law schools have been meeting for the last year to study the possibility of transitioning to the Uniform Bar Exam (UBE). The exam tests the knowledge and skills that every lawyer should demonstrate before becoming licensed to practice law. Because adopting the uniform exam would be a significant change, we want to hear your thoughts and any concerns about this possible change. Comments may be submitted by Sept. 16.

The Uniform Bar Exam was first administered in 2011. The uniform exam is prepared by the National Conference of Bar Examiners (NCBE) and is administered, graded and scored by participating jurisdictions. Sixteen states, mostly in the western part of the country, and the District of Columbia have adopted the UBE. In May, New York announced plans to implement the UBE in 2016. The NCBE website provides a clear map showing the west-wide trend of adopting states and lists which 16 states are currently UBE jurisdictions. See <https://www.ncbex.org/exams/ube>.

What is the Uniform Bar Exam?

The UBE consists of three components. The Multistate Bar Examination (MBE) is a six-hour, 200-question multiple-choice examination covering seven subject areas: civil procedure, constitutional law, contracts, criminal law, evidence, property and torts. The Multistate Performance test (MPT) is a writing assignment based on materials and case law provided as part of the exam. The Multi-state Essay Examination (MEE) is comprised of six essay questions testing legal knowledge and reasoning.

The structure of the current Oregon bar exam is identical to the uniform bar exam structure. The current Oregon exam includes the MBE, MPT and six essay questions.

The primary difference between the two examinations is the essay questions' content; the subject areas tested are not identical. The subject areas currently tested on the Oregon bar exam that are not tested under the Multistate Essay Exam are: administrative law (federal and state); federal income tax; Oregon civil procedure; Oregon ethics; and Oregon evidence. The two subject areas tested by the multistate essay exam that are not currently tested on the Oregon bar exam are conflict of laws and family law.

Impact of Adopting the UBE on Admission

Adopting the UBE provides portability for applicants' exam results. Law school graduates taking the uniform bar exam in other states could use the test scores for possible admission to the Oregon bar. Applicants taking the uniform bar exam in Oregon could likewise use those test scores for possible admission to the bar in other UBE states.



This is distinct from the current reciprocity rules for admission to the Oregon bar. Reciprocity admission allows lawyers to seek admission by motion — without taking the bar exam — if the lawyer has been admitted in another jurisdiction and has practiced law for at least five years, or three years in Alaska, Idaho, Utah and Washington. Adoption of the UBE would provide a similar portability to recent law school graduates. If an applicant's UBE test score exceeded the Oregon standard passing score, the applicant would be deemed to have the required knowledge and skill for bar admission.

Oregon (through Board of Bar Examiners recommendations to the Oregon Supreme Court) would continue to have independent authority in the following areas:

Character and fitness. The Oregon Supreme Court and the Board of Bar Examiners review applicants for character and fitness. Under Oregon law, successful applicants must possess "good moral character," which includes honesty, fairness and respect for others and the law. Conduct that raises a substantial doubt about whether an applicant possesses these qualities is a basis for denying admission. This is a distinct requirement for admission to the bar, separate from passing the bar exam which tests an applicant's competence to practice law. Adoption of the UBE would not impact this requirement or its administration.

ADA decisions. The Oregon Supreme Court and Board of Bar Examiners would continue to make accommodations decisions under the Americans with Disabilities Act for applicants taking the Oregon UBE exams. Oregon would be bound to recognize UBE scores from other jurisdictions, which may reflect accommodations in testing from the testing jurisdiction.

Pass scores. The Board of Bar Examiners would continue to establish a pass score, which is the test score needed to demonstrate the required competence to practice law in Oregon. Each UBE state retains authority to set its own pass score that applies to each law school graduate taking the UBE, whether in Oregon or in another UBE state.

Local law. States retain the authority to assess candidates' knowledge of jurisdiction-specific content through a separate test, course or some combination of the two, if the jurisdiction so chooses.

Expiration period for UBE scores. Adoption of the uniform exam provides applicants with portability for UBE scores. Each jurisdiction determines how long it will recognize a UBE score from another UBE jurisdiction. The expiration period in current UBE states ranges from 18 months to five years.

Eligibility. The Oregon Rules for Admission approved by the Oregon Supreme Court state who is eligible to sit for the bar examination. The UBE would have no impact on eligibility requirements.

Grading. The Oregon bar examiners will continue to grade the parts of the exam that require writing — the MEE and the MPT. The multiple choice MBE would continue to be graded by the NCBE.

What About Oregon Topics?

The consensus of the UBE Committee is that, if Oregon transitions to the UBE, then Oregon also should implement a local component or CLE covering the topics listed above that are currently included on the essay component of the Oregon bar exam but that are not included on the multistate essay exam. In addition, the group supports including a course component regarding the distinctive culture of the Oregon bar and the importance of civility and collegiality within the Oregon bar. Finally, the UBE Committee acknowledges that the Oregon law schools and law students would need some time to adjust class planning in light of the new test topics.

Benefits and Potential Impacts

New law graduates would be the prime beneficiaries of a transition to the UBE. With the difficult legal market, new law graduates often do not have employment confirmed when they must register for the bar exam. By the time the employment comes along, it may be in another jurisdiction. The result may be that a new graduate must wait to take a second bar exam in another jurisdiction. This can lead to long delays before a new law graduate can enter the legal profession. This delay impacts not only new law school graduates but also employers and the public.

Putting recent law graduates and their employers in this position might be warranted if bar examinations in different states were significantly different. But that is no longer the case. The Oregon bar exam is substantially the same as the UBE. Any local law differences can be addressed through supplemental testing or a CLE requirement.

Nevertheless, the UBE Committee wants to be sure to consider all relevant effects of transitioning to the UBE. For example, increasing portability for recent law school graduates could result in more lawyers admitted in Oregon. The impact that adoption of the UBE might have on the number of lawyers admitted in Oregon is difficult to predict given the complex variety of factors at play, including the opportunity of Oregon applicants to transfer to other UBE states, the legal markets in UBE states and the fact that Oregon's standard pass score is among the highest. Nevertheless, any applicant with a UBE score that exceeds the Oregon standard could be admitted in Oregon, subject to passing character and fitness review and satisfying any local law component test or course requirement. The potential increase in the number of lawyers from out of the state could impact the legal practice and culture of our bar.

In addition, implementing a local law course and potential local law exam will increase bar exam-related costs that will need to be included in application fees. The amount of this cost increase and the fee impact will vary depending upon the requirements ultimately adopted and the means of satisfying those requirements (e.g., online or in-person courses).

Finally, adopting the UBE would transfer some control over the bar exam to the National Conference of Bar Examiners. Given the similar structure of our current Oregon bar exam and the UBE, this is unlikely to have an immediate impact. Nevertheless, future changes to the UBE by the NCBE would become part of the Oregon bar exam.

Next Steps

We each recognize that we are privileged to be members of the Oregon bar. We value working with colleagues who are committed to the values of integrity, fairness, diversity and increasing access to justice. We are grateful that Oregon lawyers recognize that the adversarial process requires no compromises in terms of civility, collegiality and a common commitment to fairness and justice. We seek your input because we want to ensure that adoption of the UBE is consistent with — and would not undermine — these foundational values and the nature of our practices in Oregon.

After consideration of your comments, the Board of Bar Examiners will make a recommendation to the Oregon Supreme Court and the court will determine whether to adopt the uniform bar exam. Please submit comments by Sept. 16 to UBecomments@osbar.org

ABOUT THE AUTHORS

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